

DECISION



THE COMPTROLLER GENERAL
OF THE UNITED STATES
WASHINGTON, D. C. 20548

60690

FILE: B-185832

DATE: March 30, 1976

MATTER OF: UTL Corporation

98435

DIGEST:

1. Question of whether offeror can perform at its bid price is one of responsibility. GAO does not review bid protests involving affirmative responsibility determinations except where fraud on part of contracting officials has been alleged.
2. Conduct of negotiations and request for best and final offers presents no basis for objecting to Government's alleged decision not to require cost or pricing data.
3. Where cost estimates of contractor were reviewed and validated during preaward survey and contractor denies existence of mistake, allegations by protester of gross mistake in awardee's price are dismissed.

UTL Corporation (UTL) protests the award of a contract to Kuras Alterman (Kuras) under solicitation No. F41608-76-R-1580 issued by the United States Air Force, San Antonio Air Logistics Center, Kelly Air Force Base, Texas. UTL's protest is based upon its contention that Kuras has so underpriced the option portion of its bid that there is either bad faith pricing, or a gross mistake, in the option portion solicited, either of which can result in a failure by Kuras to perform at its price at the time the options are to be exercised.

Our Office has consistently held that the submission of a low price or below cost bid is not a basis upon which to challenge an award. Futronics Industries, Inc., B-185896, March 10, 1976, 76-1 CPD _____. Moreover, question of whether an offeror can perform at its offered price is one of responsibility. Agnew Tech-Tran, Inc., B-184272, July 14, 1975, 75-2 CPD 32; Columbia Loose-Leaf Corporation, B-184645, September 12, 1975, 75-2 CPD 147.

Our Office does not review protests against affirmative determinations of responsibility, unless either fraud is alleged on the part of the procuring officials or where the solicitation

contains definitive responsibility criteria which allegedly have not been applied. Central Metal Products, Inc., 54 Comp. Gen. 66 (1974), 74-2 CPD 64; United Hatters, Cap and Millinery Workers International Union, 53 Comp. Gen. 931 (1974), 74-1 CPD 310. The standards for responsible prospective contractors and the requirements for affirmative responsibility determinations essentially involve subjective judgments which are largely within the discretion of procuring officials.

Where the contracting officer finds the proposed contractor responsible, this affirmative responsibility determination should not be questioned by this Office. However, we continue to consider protests against determinations of nonresponsibility to provide assurance against the arbitrary rejection of bids.

In addition, UTL alleges that since the contracting officer may have failed to require offerors to submit cost or pricing data, the instant contract may have been awarded in violation of 12 U.S.C. 2306(f) (1970). However, this provision provides an exception to the requirement for furnishing cost or pricing data if the negotiated price is based on adequate price competition. Also see ASPR § 3-807.3(f). UTL contends that adequate price competition as defined in ASPR § 3-807.1(b)(1) did not exist in the instant case since offerors were required to submit "best and final" offers. Adequate price competition is defined in the above-cited regulation as follows:

"(1) Adequate Price Competition.

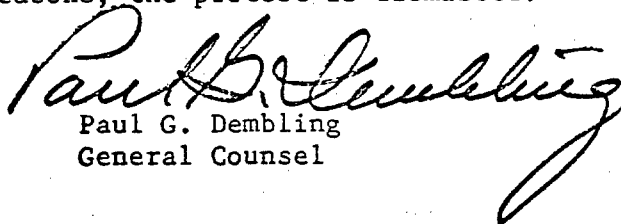
a. Price competition exists if offers are solicited and (i) at least two responsible offerors (ii) who can satisfy the purchaser's (e.g., the Government's) requirements (iii) independently contend for a contract to be awarded to the responsive and responsible offeror submitting the lowest evaluated price (iv) by submitting priced offers responsive to the expressed requirements of the solicitation. Whether there is price competition for a given procurement is a matter of judgment to be based on evaluation of whether each of the foregoing conditions (i) through (iv) is satisfied. Generally, in making this judgment, the smaller the number of offerors, the greater the need for close evaluation."

In our opinion, the fact that negotiations were conducted and "best and final" offers requested presents no basis for objecting to the Government's decision not to require cost or pricing data. To the contrary, such negotiation procedures normally are utilized to effect increased competition.

B-185832

Finally, UTL contends that the price submitted by Kuras for option items might have been the result of a gross mistake. However, Kuras apparently reviewed and validated its cost estimates during a preaward survey, and subsequently it has disclaimed any mistake in its offer. Therefore, we must decline to further consider this matter.

For the foregoing reasons, the protest is dismissed.


Paul G. Dembling
General Counsel